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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. [redacted] 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

FRANK S. HOGAN,
District Attorney of New York County,
WHITMAN KNAPP,
Assistant District Attorney of New York County,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC.,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now comes appellee and moves that the appeal be dismissed, or in the alternative that the final judgments appealed from be affirmed.

Preliminary Statement

This is an appeal from final judgments of the Court of Special Sessions of the City of New York [Judicial Code, §237(a), 28 U. S. C., §344(a); and 45 Stat. 54, 28 U. S. C., §§ 861 a, 861 b], entered upon an order of the Court of Appeals (297 N. Y. 687) unanimously affirming without opinion an order of the Appellate Division of the Supreme Court (R. 83-4;[1] 272 App. Div. 799) which unanimously

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[1] Unless otherwise indicated, references marked "R." are to pages in the record before the New York Court of Appeals. Those marked "p." or "pp." are to pages in People's Exhibit 1, *Memoirs of Hecate County.*

affirmed the original judgments of the Court of Special Sessions convicting defendant of the crimes of Publishing and Selling an Obscene Book (R. 59, 63; Perlman, J., dissenting at R. 76-8; New York Penal Law, §1141, subd. 1). This appeal was allowed by the Chief Judge of the Court of Appeals.

Introduction

Appellant, convicted of publishing an obscene book, *Memoirs of Hecate County* (Exh. 1), has never attacked the validity, on its face, of the statute under which the conviction was had. Its principal contention has been that the factual finding of obscenity contravened the constitutional guarantee of a free press (see R. 21, 55; *Assignment of Errors; Statement as to Jurisdiction*).

The Statute

Subdivision 1 of section 1141 of the New York Penal Law, the statute under which appellant was convicted, provides that any person shall be guilty of a misdemeanor who:

> "sells * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; * * * or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book * * *."

The Book

The greater part of the book (Exh. 1) is devoted to a story entitled *The Princess with the Golden Hair* (pp. 82-239), which in turn is almost wholly comprised of descriptions of the hero's sexual activities. The principal plot deals with his seduction of one Imogen Loomis, a married woman (see pp. 189-94). A sub-plot relates to his sexual

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activities with another married woman, Anna Lenihan, whom he picked up in a dance hall (see pp. 106-10). The two plots are joined when gonorrhea, contracted from Anna, interferes with the hero's timetable of conquests in his affair with Imogen (pp. 124-5, 131-2, 139).

The story eschews moral judgment and concerns itself chiefly with techniques of seduction and descriptions of intercourse. More than fifteen assorted sexual acts are described or suggested (pp. 109-10, 110-1, 113, 114, 119-20, 122, 123, 153, 155, 159-60, 168, 189-91, 192, 194, 196, 207, 231). In addition the story contains three frustrated attempts at intercourse (pp. 98, 109, 183-4), designs, plans and stratagems to seduce the heroine (pp. 145-8), numerous anecdotes about sex and allied subjects, various filthy conversations (pp. 110, 111, 113, 114, 115, 118, 119, 120, 122, 123, 161, 187, 197-8, 231) and assorted reveries of intercourse (pp. 188, 214).

Point I

No Substantial Question Is Presented

The statute under which the conviction was had is a typical declaration of common law obscenity (see *The Statute, supra; Appendix, infra*), and its constitutionality on its face has never been attacked in this proceeding (*cf.* R. 21, 55; Appellant's *Statement as to Jurisdiction*). The factual finding that the book (Exh. 1) is obscene would be justified under any workable standard of obscenity that could be devised. It follows that no substantial constitutional question is presented [see *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572; also, *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Tyomies Publishing Co.* v. *United States* (C. C. A. 6th 1914) 211 Fed. 385, 388; *United States* v. *Harmon* (D. Kans. 1891) 45 Fed. 414, 415-416, rev'd on other grounds 50 Fed. 921; *United States* v. *Journal Co.* (E. D. Va. 1912) 197 Fed. 415, 418;

Rebhuhn v. *Cahill* (S. D. N. Y. 1939) 31 Fed. Supp. 47, 49; *Williams* v. *State* (1923) 130 Miss. 827, 841-842, 94 So. 882, 883; 2 Cooley's *Constitutional Limitations* (8th ed. 1927) pp. 886, 1328].

As the Court declared in *Chaplinsky* v. *New Hampshire*, 315 U. S., at pp. 571-572:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene • • •."

Conclusion

The contention that appellant's constitutional rights were violated by the instant finding of obscenity is insubstantial and foreclosed by previous decisions of the Court. The appeal should therefore be dismissed, or in the alternative the judgments appealed from should be affirmed.

Respectfully submitted,

FRANK S. HOGAN,
District Attorney, New York County.

WHITMAN KNAPP,
Assistant District Attorney,
Of Counsel.

January, 1948.

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APPENDIX

American Obscenity Statutes

Practically every American jurisdiction has a statute similar in effect to the one here involved. See *The Statute, supra; United States Code* (1940) tit. 18, §334; *id.*, tit. 19, §1305; *Ala.* Code Ann. (1940) tit. 14, §373; *Ariz.* Code Ann. (1939) §43-3002; *Ark.* Dig. Stat. (1937) §3381; *Cal.* Pen. Code (1941) §311, subd. 3; *Canal Zone* Code (1934) tit. 5, §451, subd. c; *Colo.* Stat. Ann. (1935) ch. 48, §217; *Conn.* Gen. Stat. (1930) §6244; *Del.* Rev. Code (1935) §2555; *D. C.* Code (1940) §22-2001; *Fla.* Stat. (1941) §847.01; *Ga.* Code Ann. (1933) §26-6301; *Guam Pen.* Code (1933) §311; *Hawaii* Rev. Laws (1945) §11107; *Idaho* Code Ann. (1932) §17-2101, subd. 3; *Ill.* Ann. Stat. (1935) ch. 38, §468; *Ind.* Ann. Stat. (Burns 1933) §10-2803; *Iowa* Code (1946) §725.4; *Kan.* Gen. Stat. Ann. (1935) §21-1101; *Ky.* Rev. Stat. (Cullen 1944) §436-100; *La.* Code Crim. Law & Proc. Ann. (1943), art. 740-106 (2); *Me.* Rev. Stat. (1944) ch. 121, §24; *Md.* Ann. Code Gen. Laws (1939) art. 27, §495; *Mass.* Ann. Laws (1933) ch. 272, §28; *Mich.* Comp. Laws (1929) §16829; *Minn.* Stat. Ann. (West 1945) §617.24; *Miss.* Code Ann. (1942) §2288; *Mo.* Rev. Stat. Ann. (1939) §§4660-4661; *Mont.* Rev. Code Ann. (1935) §11136, subds. 3, 4; *Neb.* Rev. Stat. (1943) §28-921; *Nev.* Comp. Laws Ann. (1929) §10144, subd. 1; *N. H.* Rev. Laws (1942) ch. 441, §14; *N. J.* Stat. Ann. (1939) §2-140-2; *N. M.* Stat. Ann. (1941) §14-1812 (local option); *N. C.* Gen. Stat. Ann. (1943) §14-189; *N. D.* Rev. Code (1943) §12-2109; *Ohio* Gen. Code Ann. (1939) §13035; *Okla.* Stat. (1941) tit. 21, §1021; *Ore.* Comp. Laws Ann. (1940) §23-924; *Pa.* Stat. Ann. (1945) tit. 18, §4524; *R. I.* Gen. Laws (1938) ch. 610, §13; *S. C.* Code Ann. (1942) §1443; *S. D.* Code (1939) §13.1722(3); *Tenn.* Code Ann. (Williams 1934) §11190; *Tex.* Pen. Code Ann. (1938) art. 526; *Utah* Code Ann. (1943) §15-8-41 (local option); *Vt.* Pub. Laws (1933) §8621; *Va.* Code Ann. (1942) §4549; *Wash.* Rev. Stat. Ann. (1932) §2549(1); *W. Va.* Code Ann. (1943) §6066; *Wis.* Stat. (1945) §351.38(1); *Wyo.* Comp. Stat. Ann. (1945) §9-513.